Supreme Court, U. S.
FILED
MAY 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1539

BOARD OF OPTOMETRY,
STATE OF CALIFORNIA,

Appellant,

vs.

CALIFORNIA CITIZENS ACTION
GROUP, et al.,

Appellees.

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# MOTION TO AFFIRM

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APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

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# MOTION TO AFFIRM

## STATEMENT OF THE CASE

Appellees are the California Citizens Action Group, a non-profit organization and four California residents who use prescription eyeglasses. Appellant is the California State Board of Optometry, which regulates the practice of Optometry in California.

Appellees brought this action in the United States District Court, Central District of California, Case No. CV 74-2079 FW to enjoin appellant Board of Optometry the California Board of Medical Examiners, and the Department of Consumer Affairs from enforcing certain statutes and administrative regulations which prohibit the advertising of the price of eyeglasses. Appellees contended that §§ 651.3, 2556 and 3129 of the California Business and Professions Code and Title 16, § 151(6) of the California Administrative Code violate their first amendment rights to receive valuable information concerning the price of eyeglasses.

Before the hearing on appellees' motion for a preliminary injunction, the District Court consolidated this action with Central District of California Case No. CV 74-2321 (AAH) FW (a similar action brought by Terminal-Hudson Electronics, Inc. of California, dba Opti-Cal, a registered dispensing optician), and ordered the convening of a District Court of three judges pursuant to 28 U.S.C. § 2281. On January 6, 1976, approximately nine



months after the hearing on the motion for a preliminary injunction, the District Court issued a 2-1 decision stating that it would preliminarily enjoin the named defendants from enforcing the challenged statutes and regulation. The court also dismissed Case No. CV 74-2321 (AAH) FW on the grounds that a state suit involving the same parties and issues is currently pending in the state court. That dismissal is not before this Court. The Order for Preliminary Injunction was entered by the District Court on February 5, 1976. On February 27, 1976, appellant filed with the Clerk of the District Court a notice of appeal from the order granting a preliminary injunction.

On March 22, 1976, this Honorable United States Supreme Court granted appellant's application for a stay of the preliminary injunction.

## ISSUE ON APPEAL

THERE IS ONLY ONE ISSUE ON THIS APPEAL; WHETHER THE THREE JUDGE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ISSUED A PRELIMINARY INJUNCTION PROHIBITING THE STATE OF CALIFORNIA FROM ENFORCING STATUTES WHICH PROHIBIT THE DISSEMINATION OF THE PRICE OF EYEGLASSES AND CONTACT LENSES. APPELLEES SUBMIT THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

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A. The United States Supreme Court Has NOT Previously Upheld the Constitutionality of Statute Prohibiting Price Advertising of Eyeglasses When Challenged on First Amendment Grounds

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Appellant cites Williamson v. Lee Optical and Head v. New Mexico as cases wherein this Honorable Court has upheld the constitutionality of statutes prohibiting price advertising of eyeglasses. This statement is vague. In those 2 cases the United States Supreme Court held that laws prohibiting price advertising of eyeglasses did not violate the Fourteenth Amendment of the United States



Constitution.

Appellant relies heavily on a statement made by the court in Williamson stating

> "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

The court in Williamson "saw no constitutional reason" because the conduct of the state was not challenged on first amendment grounds. It is well settled law that only questions presented are decided. The Amicus Curiae in support of Appellant in the instant case was kind enough to point this out to this Honorable Court. On page 5 of the Amicus brief, first full paragraph last 4 lines he states:

> "A contention that there was an invalid restraint on freedom of speech protected by the Fourteenth Amendment was not expressly

considered because it had not been properly presented."

The amicus cites Head v. New Mexico, 374 U.S. 432 note 12. Appellees agree entirely with this premise and submit that neither Williamson v. Lee Optical nor Head v. New Mexico considered first amendment challenges and therefore are not on point.

A second reason why the United States Supreme Court in 1954 may have made such a statement, and why the First Amendment was not presented was that at this time Valentine v. Christensen, 316 U.S. 52 (1941), holding that "advertising did not warrant first amendment protection" may still have been good law. Since the Williamson case in 1954, later cases concerning advertising and the First Amendment have held that advertising may warrant First Amendment protection.

Pittsburg Press Co. v. Pittsburg Commission on Human Rights, 413 U.S. 376 (1972);

United States v. Pellegrino, 467 F.2d 4 (9th Cir. 1972);



Hutt v. United States, 415 F.2d 664 (5th Cir. 1969), cert. denied, 397 U.S. 936 (1970).

If these cases had been law at the time Williamson v. Lee Optical was decided, the Supreme Court might not have made such a statement.

The fact that Williamson v. Lee Optical and Head v. New Mexico were decided on Fourteenth Amendment grounds and not on First Amendment grounds is of great importance. First Amendment rights have long been recognized to occupy a "preferred position" in the hiarchy of constitutional freedom. Saia v. New York, 334 U.S. 105. To implement this "preferred position" this Honorable Court has established different tests to uphold statutes challenged on First Amendment grounds rather than Fourteenth Amendment grounds. Under Fourteenth Amendment grounds a statute is required merely to have a rational basis. Nebbia v. New York, 291 U.S. 502; Olsen v. Nebraska, 313 U.S. 236; Williamson v. Lee Optical, 348 U.S. 483. But when a statute is challenged on First Amendment grounds, a state must show a

compelling state interest and the lack of a less drastic means in order to accomplish their objectives. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Shelton v. Tucker, 354 U.S. 479 (1960).

B. Appellant's Assertion That the Three-Judge District Court Failed to Balance Interests on the State is Invalid

The three-judge court specifically confronted appellant's contention that there should be a weighing of the factors. The court weighed the factors on p. A 14 (bottom) of its opinion.

The court stated:

> "The defendants further insist that each of the factors that must be considered in weighing the application for a preliminary injunction as required by King v. Saddleback Junior College District, 425 F.2d 426, 427 (9th Cir. 1970), weigh heavily against a grant of temporary relief herein. We believe to the contrary."



The court based its conclusion that the interests were balanced against the state and that temporary relief should issue on the reasonableness of Terry and the Virginia Citizens Consumer Council case cited in its opinion. The three-judge panel further gave 3 reasons for its conclusion:

1. That plaintiff's First Amendment rights suffer and sustain injury day by day. Citing Kusper v. Pontikes, 414 U.S. 51.

2. The court reasoned that the right to receive factual information concerning costs of eyeglasses were as much in the public interest as drugs, etc., decided in the Terry case, etc.

3. That there is great probability that plaintiffs will succeed.

These reasons are set out on pages A 15-A 17 of the three-judge opinion.

The court compared these to the state's interest. On page A is No. 1. The court stated,

> "Yet the issuance of temporary relief from the enforcement of

the offending provisions of the challenged sections will not result in any recognizable hardship to the legitimate interests and purposes of the State of California which can adequately be served by immediate enactment of less drastic means of lawful police power health and welfare regulation of the artisians engaged in the making and dispensing of prescription eyeglasses."

This language shows conclusively that the court did balance the interests and found that the interests favored temporary relief. The court supports its reasoning with good authority. Therefore whether this Honorable Court agrees with the three-judge panel as to how the interests are balanced, the court was well within its discretion in granting temporary relief to the appellees.



### C. Appellant's Assertion That Bigelow v. Virginia Reaffirms That a State May Constitutionally Regulate Commercial Advertising of Prescription Eyeglasses is True, But is Irrelevant to This Cause of Action

Appellee has never contended that advertising could not be regulated. Appellee contends that price advertising deserves First Amendment protection and cannot be prohibited without a compelling state interest, which outweighs the public interest. Bigelow reaffirmed Williamson and Head in relation to the Fourteenth Amendment, which requires only a rational basis to uphold. However, in reference to the First Amendment, under which this action is brought, Bigelow stated:

> "The existence of commercial activity, in itself, is not justification for narrowing the protection of expression secured by the First Amendment. Ginzburg v. United States, 383 U.S. 463, 474 (1966)."

"A court may not escape the task of assessing the first amendment interest at state and weighing it against the public interest allegedly served by the regulation."

Bigelow did not overrule Williamson and Head but it distinguished them basing the differences between the tests required to uphold statutes challenged on First Amendment grounds as opposed to Fourteenth Amendment grounds.

D. Appellant Contends That the Three-Judge Panel Should Not Issue a Preliminary Injunction While Cases Presenting Similar Issues Have Been Argued and Are Pending Before This Court, However Appellant Fails to Cite Any Case Law to Support This Contention

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The theory that appellant espouses, concerning refraining from deciding similar issues before the Supreme Court, is more a matter of discretion than mandatory.

However, aside from this fact, there



are other factors which the three-judge court had to consider in deciding whether to grant relief. The court had to consider that First Amendment rights were being chilled day by day which is grounds for temporary injunctive relief, Dombrowski v. Phitser, 380 U.S. 479 (1965) and the possibility of distinctions between the issues in the instant case as opposed to the drug cases.

Further the three-judge panel had ample authority based upon U.S. Supreme Court decision without considering the Terry and Virginia Drug cases. The court could have properly granted relief based upon Bigelow v. Virginia, 43 U.S. L.W. 473 4 (U.S. June 16, 1975), Lamont v. Post Master General, 381 U.S. 301 (1965) and other cases cited in their opinion.

## E. Whether This Injunction Upsets the States Quo or Not is a Question of Fact, and Only One of the Factors to be Taken Into Consideration in Determining Whether Temporary Injunctive Relief Should be Granted

The three-judge panel addressed the status quo question on p. A 14 of its opinion. They concluded that commercial advertising deserved First Amendment consideration. The court in Wood v. State, 76 Oklahoma CA 89 said,

> "Until it is proven that this statute is Constitutional, these rights (First Amendment), are not to be denied."

Zwicketer v. Koota, 389 U.S. 24 held that

> "... any delay in not granting the injunctive relief prayed might in itself effect the impossible chilling of the very constitutional right he seeks to protect."



## F. The Fact That the People of California Will Have "Extra Dollars" is Not Irreparable Harm if This Injunction is Allowed to Stand

Appellant has a wild imagination to predict that in the short period of time it will take to decide this case that physicians, optometrists and opticians will all have to cut corners in order to meet advertising. It costs just as much to produce a defective eyeglass as to produce a correct eyeglass. Does the appellant really believe that a special production line will be set up to produce defective eyeglasses? How do we know that expensive eyeglasses are better or even different than cheap eyeglasses? I submit that prohibiting advertisment provides no safeguards. The legislature is free to enact any legislation governing the quality of eyeglasses, and presently has such statutes on the books. Surely this is an adequate safeguard to protect the public from the speculative resulting "chaos" predicted by appellant. Maybe allowing price advertising pending hearing by this Honorable Court will provide an opportunity to see

just what effect price advertising has on the California Health and Welfare! I submit that it will have none.

G. A Reversal of the Order Granting a Preliminary Injunction Will Harm Appellees

Appellees First Amendment rights are being harmed and appellees themselves are in danger of harm each day that they have to drive down the street without glasses because they cannot afford them. If this Honorable Court sustains this injunction and that results in expedited appeals in state courts as appellant contends then that is another reason why this injunction should be sustained because members of the public of the state of California not in only the Central District of California need their First Amendment rights protected.

If what appellant says concerning the right of private plaintiffs to enforce § 3129 of the Business and Professions Code is true then one would think if any harm is done to the public that private plaintiffs will seek to



have the prohibition of price advertising enforced through § 3129.

CONCLUSION

"Abuse of discretion" exists when it plainly appears that the action of the trial court effects an injustice, Hale v. Hale, 6 Cal.App.2d 611. These definitions make it clear that when the "abuse of discretion" test is used action taken by such court should not be overturned unless the court acted completely without reason. The well reasoned opinion of the three-judge panel is supported by ample authority and appellants have failed to allege any reason why the preliminary injunction should be overturned as an "abuse of discretion".

Appellee therefore prays that this Honorable Court uphold the preliminary injunction until a trial may be had on the merits.

Appellee further prays that in addition asking that the injunction granted by the three-judge panel be upheld, that the injunction be modified to include

prohibiting the state court from interfering with the federal court's jurisdiction so that price advertising cannot be prohibited by private plaintiffs through § 3129 of the Business and Professions Code.

Respectfully submitted,

CHARLES W. ANSHEN

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